

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition of Autotel Pursuant to Section 252(e)(5)	)	
of the Communications Act of 1934, as Amended,	)	WC Docket No. 06-194
for Preemption of the Jurisdiction of the	)	
Arizona Corporation Commission Regarding	)	
Arbitration of an Interconnection Agreement with	)	
Citizens Utilities Rural Company, Inc.	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: January 12, 2007**

**Released: January 12, 2007**

By the Chief, Wireline Competition Bureau:

**I. INTRODUCTION**

1. This Memorandum Opinion and Order (Order) addresses the petition of Autotel for preemption of the jurisdiction of the Arizona Corporation Commission (Arizona Commission) pursuant to section 252(e)(5) of the Communications Act, as amended (the Act),<sup>1</sup> with respect to an arbitration proceeding involving Autotel and Citizens Utilities Rural Company, Inc. (Citizens), and with respect to the dismissal of Autotel's request for termination of Citizens' rural exemption.<sup>2</sup> First, we find that the Arizona Commission has met the requirements of section 252 because it responded to Autotel's arbitration petition and rendered final determinations by dismissing Autotel's petition on procedural grounds. Second, we deny Autotel's request for preemption of the jurisdiction of the Arizona Commission with respect to the dismissal of Autotel's request for termination of Citizens' rural exemption under section 251(f)(1)(B) of the Act. We find that Autotel has not demonstrated that preemption with regard to its request for termination of Citizens' rural exemption is appropriate under any applicable legal basis for preemption.<sup>3</sup>

**II. BACKGROUND**

2. *Statutory Provisions and the Commission's Rules.* Section 252(e)(5) of the Act requires the Commission to preempt the jurisdiction of a state commission in any proceeding in which the state

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<sup>1</sup> 47 U.S.C. § 252(e)(5).

<sup>2</sup> See Petition of Autotel Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Arizona Corporation Commission Regarding Arbitration of an Interconnection Agreement with Citizens Utilities Rural Company, Inc., WC Docket No. 06-194 (filed October 20, 2006) (Petition). The Commission issued a public notice on Autotel's petition, establishing a pleading cycle for comments and reply comments on November 20, 2006, and December 5, 2006, respectively. See *Pleading Cycle Established for Comment on Petition of Autotel for Preemption of the Jurisdiction of Arizona Corporation Commission Pursuant to Section 252(e)(5) of the Communications Act*, WC Docket No. 06-194, Public Notice, 21 FCC Rcd 11850 (2006). The Arizona Commission and Citizens filed comments. Autotel filed reply comments.

<sup>3</sup> See Petition at 1.

commission “fails to act to carry out its responsibility” under section 252.<sup>4</sup> Section 252 sets forth the procedures for negotiation, arbitration, and approval of agreements for interconnection, services, or unbundled network elements pursuant to section 251.<sup>5</sup> Under section 252, when carriers cannot arrive at an interconnection agreement through voluntary negotiation, they may mediate and arbitrate their unresolved issues before the state commission. In arbitrating disputes, the state commission must “resolve each issue set forth in the petition and the response” and must “conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request [for interconnection].”<sup>6</sup> In addition, the state commission may require the parties “to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.”<sup>7</sup> Finally, section 252(e)(6) authorizes a party “aggrieved” by a state commission’s determination under section 252 to bring an action in federal district court.<sup>8</sup> The United States Court of Appeals for the District of Columbia Circuit has ruled that sections 252(e)(5) and 252(e)(6) are mutually exclusive, and therefore preemption by the Commission applies only where the state commission fails or refuses to make a “determination” that is reviewable under section 252(e)(6).<sup>9</sup>

3. Under the Commission’s rules, the party seeking preemption bears the burden of proving that the state commission has failed to act.<sup>10</sup> In the *Local Competition Order*, the Commission concluded that it would not take an “expansive view” of what constitutes a state commission’s “failure to act” for purposes of section 252(e)(5).<sup>11</sup> Rather, the Commission limited the instances in which preemption pursuant to section 252(e)(5) is appropriate to “when a state commission fails to respond, within reasonable time, to a request for mediation or arbitration, or fails to complete an arbitration within the time limits of section 252(b)(4)(C).”<sup>12</sup>

4. Section 251(f) exempts certain rural telephone companies from various interconnection and unbundling requirements imposed on incumbent local exchange carriers under section 251 of the Act. Pursuant to section 251(f), a state commission may terminate an exemption for a rural telephone company if a bona fide request from a competing carrier for interconnection, services, or network elements “is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof).”<sup>13</sup>

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<sup>4</sup> 47 U.S.C. § 252(e)(5).

<sup>5</sup> 47 U.S.C. §§ 251-52.

<sup>6</sup> 47 U.S.C. § 252(b)(4)(C).

<sup>7</sup> 47 U.S.C. § 252(b)(4)(B).

<sup>8</sup> 47 U.S.C. § 252(e)(6).

<sup>9</sup> See *Global NAPS, Inc. v. FCC*, 291 F.3d 832, 836-37 (D.C. Cir. 2002) (“Both the plain language and structure of this provision suggest that the remedies it authorizes are distinct and mutually exclusive. If a state commission fails to act, preemption is a viable option; however, if the state agency takes final action disposing of the pending claim, that action can be undone only by a direct review in the appropriate forum.”).

<sup>10</sup> See 47 C.F.R. § 51.803(b); see also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Services Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 16128, para. 1285 (1996) (*Local Competition Order*) (subsequent history omitted).

<sup>11</sup> *Local Competition Order*, 11 FCC Rcd at 16127, para. 1283.

<sup>12</sup> *Id.* at 16128, para. 1285; see 47 C.F.R. § 51.801(b).

<sup>13</sup> 47 U.S.C. § 251(f).

5. **Procedural History.** On March 27, 2003, Autotel filed with the Arizona Commission a petition for arbitration of an interconnection agreement with Citizens.<sup>14</sup> The Arizona Commission arbitrated and issued a decision on that petition on October 5, 2004.<sup>15</sup> Autotel filed a complaint in the United States District Court for the District of Arizona on May 5, 2005, alleging generally that the Arizona Commission's arbitration decision did not comply with the Act.<sup>16</sup> The record before us shows that Autotel and Citizens have not executed an interconnection agreement incorporating the results of the arbitration.<sup>17</sup>

6. On November 21, 2005, Autotel requested for a second time to initiate interconnection agreement negotiations with Citizens. On the same day, Autotel filed with the Arizona Commission a notice of bona fide request for interconnection, services and network elements with Citizens and a request for an Arizona Commission inquiry and termination of Citizens' exemption pursuant to section 251(f)(1)(B) of the Act.<sup>18</sup> The Arizona Commission held a procedural conference on December 12, 2005 to discuss whether Autotel was precluded from filing the application due to its pending appeal. In the conference, the Arizona Commission also considered whether it was necessary to terminate Citizens' rural exemption for the purposes of the interconnection agreement. On January 6, 2006, along with opening briefs, Citizens filed a Motion to Dismiss. On March 23, 2006, the Arizona Commission dismissed Autotel's requests, with prejudice, noting that Citizens had not invoked the section 251(f) exemption and that interconnection was possible under the arbitrated interconnection agreement, even though Autotel had thus far failed to make use of the existing interconnection agreement.<sup>19</sup>

7. On April 7, 2006, Autotel filed with the Arizona Commission a second Petition for Arbitration for a new interconnection agreement with Citizens, pursuant to section 252(b) of the Act. On May 2, 2006, Citizens filed a Motion to Dismiss the Petition for Arbitration. On July 28, 2006, the Arizona Commission dismissed Autotel's Petition for Arbitration, with prejudice, citing the findings from its March 23, 2006 Order.<sup>20</sup>

8. On October 20, 2006, Autotel filed its petition for preemption of the Arizona Commission's jurisdiction with this Commission. In its Petition, Autotel contends that the Arizona Commission failed to carry out its responsibility under section 252 by (1) dismissing Autotel's April 7, 2006 petition for

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<sup>14</sup> See Petition, Attach., *Opinion and Order*, Arizona Corporation Commission, Docket No. T-01954B-05-0852, Decision No. 68605 (Mar. 23, 2006), at 2 (*Arizona Opinion and Order*). Although the underlying arbitration proceedings before the Arizona Commission have a long procedural history, we highlight only those events that are relevant to our discussion.

<sup>15</sup> See Citizens Comments, Attach., *Opinion and Order*, Arizona Corporation Commission, Docket No. T-03234A-03-0188, Decision No. 67273 (Oct. 5, 2004) (*Arizona Arbitration Order*). In the *Arizona Arbitration Order*, the Arizona Commission adopted the open issues resolved through arbitration and ordered Autotel and Citizens to prepare and sign an interconnection agreement incorporating the terms of the Arizona Commission's resolutions to be submitted to the Arizona Commission for review within thirty days of the date of the order.

<sup>16</sup> See *Arizona Opinion and Order* at 2-3.

<sup>17</sup> See *id.* at 2.

<sup>18</sup> See *id.* at 3.

<sup>19</sup> See *id.* at 4-5.

<sup>20</sup> See Petition, Attach., *Procedural Order*, Arizona Corporation Commission Docket No. T-01954B-06-0232, Procedural Order (July 28, 2006) (*Arizona Procedural Order*).

arbitration without resolving open issues;<sup>21</sup> and (2) dismissing Autotel's section 251(f) request for termination of Citizens' rural exemption.<sup>22</sup>

### III. DISCUSSION

9. First, we deny Autotel's request for preemption of the jurisdiction of the Arizona Commission with respect to the arbitration proceeding at issue involving Autotel and Citizens. We conclude that Autotel has not met its burden of demonstrating that the Arizona Commission "failed to act" within the meaning of section 252(e)(5). Autotel contends that the Arizona Commission "failed to act" because it did not schedule any proceedings in order to complete its duties under section 252(b)(4); did not request information from either party; and did not make a determination as to whether the contract language proposed by either party met the requirements of section 251.<sup>23</sup> As in our previous orders denying Autotel's petitions for preemption,<sup>24</sup> we find that the Arizona Commission's procedural dismissal of Autotel's petition for arbitration of an interconnection agreement with Citizens does not constitute failure to act under section 252 of the Act.<sup>25</sup> Rather, we find that the Arizona Commission's procedural dismissal satisfies its obligation to act under section 252(e)(5).<sup>26</sup>

10. As this Commission has recognized, "a state commission carrie[s] out 'its responsibility [under section 252]' when it resolves the merits of a section 252 proceeding or dismisses such a proceeding on jurisdictional or procedural grounds."<sup>27</sup> The record demonstrates that in response to the arbitration petition filed by Autotel, the Arizona Commission docketed the petition, followed a procedural

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<sup>21</sup> See Petition at 2.

<sup>22</sup> See *id.* at 1.

<sup>23</sup> See *id.* at 2.

<sup>24</sup> See *Petition of Autotel Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Public Utilities Commission of Nevada Regarding Arbitration of an Interconnection Agreement with SBC Nevada*, WC Docket No. 04-311, Memorandum Opinion and Order, 19 FCC Rcd 20920 (Wireline Comp. Bur. 2004) (*Nevada Autotel Order*); *Petition of Autotel Pursuant to Section 252(e)(5) of the Communications Act of 1934, as Amended, for Preemption of the Jurisdiction of the Arizona Corporation Commission, the Colorado Public Utilities Commission, the New Mexico Public Regulations Commission, the Oregon Public Utility Commission, and the Utah Public Service Commission Regarding Arbitrations of Interconnection Agreements with Qwest Corporation*, WC Docket No. 06-134, Memorandum Opinion and Order, 21 FCC Rcd 11301 (Wireline Comp. Bur. 2006) (*Five State Autotel Order*), *app. for review pending*, Autotel, Inc. & Western Radio Services Company, Inc. Application for Review (filed Nov. 6, 2006) (*Five State Autotel Order Application for Review*).

<sup>25</sup> See generally *Nevada Autotel Order*, 19 FCC Rcd 20920; *Five State Autotel Order*, 21 FCC Rcd 11301.

<sup>26</sup> See 47 C.F.R. § 51.801(b).

<sup>27</sup> *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-52, Memorandum Opinion and Order, 15 FCC Rcd 11277, 11280-81, para. 8 (2000) (*Starpower Order*); see also *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission*; *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with BellSouth Before the Georgia Public Service Commission*; *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with GTE South Before the Public Service Commission of South Carolina*, CC Docket Nos. 97-163, 97-164, 97-165, Memorandum Opinion and Order, 13 FCC Rcd 1755, 1773-74, para. 33 (1997) (*Low Tech Designs Order*) ("[A] state commission does not 'fail to act' when it dismisses or denies an arbitration petition on the ground that it is procedurally defective . . ."), *recon. denied*, 14 FCC Rcd 7024 (1999); *Global NAPs South, Inc. Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Dispute with Bell Atlantic-Virginia, Inc.*, CC Docket No. 99-198, Memorandum Opinion and Order, 15 FCC Rcd 23318, 23326, 23327, paras. 16, 19 (Com. Car. Bur. 1999).

schedule and issued an order on the petition.<sup>28</sup> When “the state agency actually ‘makes a determination’ under § 252 – there is no statutory basis for FCC preemption.”<sup>29</sup> Moreover, section 252(e)(5) “does not empower [the Commission] to look behind a state agency’s dismissal of a carrier’s claim to evaluate the substantive validity of that dismissal.”<sup>30</sup> Thus, the Arizona Commission’s dismissal of Autotel’s arbitration petition on procedural grounds, without addressing the possible merits of Autotel’s arbitration issues, was a final determination by the Arizona Commission and cannot be deemed a “failure to act” under section 252 of the Act. When, as in this case, a state commission has acted on a timely basis to resolve an interconnection dispute, section 252(e)(6) provides the basis for federal court review; section 252(e)(5) provides no alternative forum for appeal.<sup>31</sup>

11. We also reject Autotel’s argument that the Commission’s *MCI Preemption Order* supports its petition.<sup>32</sup> Autotel argues that the *MCI Preemption Order* held “that a state agency can fail to act under section 252(e)(5) even if it has issued an arbitration order, if that order is a general dismissal that does not resolve all issues ‘clearly and specifically’ presented to it.”<sup>33</sup> In support of its argument, Autotel also quotes *Global NAPS, Inc. v. FCC* for the proposition that “[t]he FCC’s interpretation thus suggests that only if the state commission either does not respond to a request, or refuses to resolve a particular matter raised in a request, does preemption become a viable option.”<sup>34</sup> The record before us demonstrates that the Arizona Commission arbitrated Autotel’s March 27, 2003 arbitration petition and issued a decision, which remains subject to appeal. Further, the Arizona Commission responded, as required by section 252, to Autotel’s second arbitration petition not by issuing a “general dismissal” that refused to act on the petition, but by dismissing it on procedural grounds because Autotel was subject to the Arizona Commission’s October 5, 2004 arbitration order, even though Autotel had thus far failed to make use of the arbitrated interconnection agreement.<sup>35</sup> As the Commission has previously concluded, the Arizona

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<sup>28</sup>See *Arizona Procedural Order* at 2.

<sup>29</sup>*Global NAPS, Inc. v. FCC*, 291 F.3d at 836.

<sup>30</sup>*Id.* at 837 (upholding the Commission’s conclusion that section 252(e)(5) does not authorize preemption to review the substantive validity of a state commission’s dismissal of a party’s claim); see also *Low Tech Designs Order*, 13 FCC Rcd at 1774-75, para. 36.

<sup>31</sup>See *Global NAPS, Inc. v. FCC*, 291 F.3d at 836-37; see also *Low Tech Designs Order*, 13 FCC Rcd at 1775, para. 37; *Petition of Supra Telecommunications & Information Systems, Inc., (Supra) Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Florida Public Service Commission*, WC Docket No. 02-238, Memorandum Opinion and Order, 17 FCC Rcd 22884, 22891, para. 13 (Wireline Comp. Bur. 2002) (“[A]ny grounds for seeking review of the Florida Commission’s action – whether alleging substantive or procedural flaws – are properly addressed to a federal district court pursuant to section 252(a)(6) of the Act.”); see also *Nevada Autotel Order*, 19 FCC Rcd 20920; *Five State Autotel Order*, 21 FCC Rcd 11301.

<sup>32</sup> Petition at 2.

<sup>33</sup> Petition at 2. (quoting *MCI for Preemption Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 97-166, Memorandum Opinion and Order, 12 FCC Rcd 15594, 15611, para. 27 (1997) (*MCI Preemption Order*)). We note that Autotel’s characterization of the holding of the *MCI Preemption Order* is not fully consistent with the language of that order. Even assuming that Autotel accurately characterized the holding, we do not believe that it supports Autotel’s argument. See *MCI Preemption Order*, 12 FCC Rcd at 15611, para. 27 (concluding that a state commission may not be found to have “failed to act” within the meaning of section 252(e)(5) in cases involving arbitration proceedings “if the issue or issues that are the subject of the preemption petition were never clearly and specifically presented to the state commission in accordance with any procedures set forth by the state commission.”).

<sup>34</sup> See Petition at 2 (quoting *Global NAPS, Inc. v. FCC*, 291 F.3d at 837) (emphasis added).

<sup>35</sup> See *Arizona Opinion and Order* at 5; *Arizona Procedural Order* at 3.

Commission's procedural dismissal is a response to Autotel's request and satisfies the section 252(e)(5) obligation.<sup>36</sup>

12. Further, we are not convinced that Autotel's explanation of its actions supports its argument that the Arizona Commission failed to fulfill its responsibilities under section 252. In its reply comments, Autotel states that it has not executed the arbitrated interconnection agreement because it alleges that Citizens failed to conform the original interconnection agreement to the *Arizona Arbitration Order*.<sup>37</sup> Based on the record before us, it appears that, rather than pursuing appropriate legal and procedural remedies to address its concerns arising from the completed arbitration proceeding with the Arizona Commission, Autotel sought to start a new arbitration of a new interconnection agreement.<sup>38</sup> We do agree with Autotel that a state commission's responsibilities under section 252(e)(5) extend beyond the scope of mediation and arbitration to interpretation of the interconnection agreement, as the Commission concluded in the *Starpower Order*.<sup>39</sup> In this case, however, the record does not reflect that Autotel sought interpretation or enforcement by the Arizona Commission of an existing interconnection agreement or of the *Arizona Arbitration Order*. Rather, as described above, Autotel filed a petition seeking a new arbitration of a new interconnection agreement, and this petition was addressed by the Arizona Commission within the prescribed timeframe. Accordingly, we find no evidence that the Arizona Commission failed to act as required by section 252.

13. Second, we deny Autotel's request for preemption of the jurisdiction of the Arizona Commission with respect to the dismissal of a request by Autotel for termination of Citizens' rural exemption under section 251(f)(1)(B) of the Act.<sup>40</sup> Section 252(e)(5) provides that "[i]f a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter."<sup>41</sup> By the terms of the statute, this type of preemption only applies to state responsibilities under section 252 of the Act. Thus, section 252 does not grant the Commission authority to preempt a state commission's authority under section 251(f)(1)(B) of the Act. Beyond the scope of section 252, the Commission may preempt state authority under certain well-established circumstances.<sup>42</sup> In this case, however, Autotel makes no attempt to show how it would satisfy the legal standard for any other type of preemption by the Commission. Thus, we conclude that, to the extent that Autotel seeks preemption of the Arizona Commission's rural exemption decision, it has failed to carry its burden to demonstrate that preemption is appropriate under any applicable legal basis for preemption.<sup>43</sup> For these reasons, we deny Autotel's Petition.

14. Finally, we remind the petitioner and other parties that the Commission's rules prohibit the filing of frivolous pleadings or pleadings filed for the purpose of delay in proceedings before the

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<sup>36</sup> See generally *Nevada Autotel Order*, 19 FCC Rcd 20920; *Five State Autotel Order*, 21 FCC Rcd 11301.

<sup>37</sup> See Autotel Reply at 1.

<sup>38</sup> See *Arizona Opinion and Order* at 5; *Arizona Procedural Order* at 3.

<sup>39</sup> See Autotel Reply Comments at 3; see also *Starpower Order*, 15 FCC Rcd at 11280, para. 6.

<sup>40</sup> Although the Petition is not entirely clear on this point, Autotel appears to request preemption, pursuant to section 252(e)(5), of the Arizona Commission's dismissal of Autotel's request for termination of Citizens' rural exemption in the *Arizona Opinion and Order*. See Petition at 1.

<sup>41</sup> 47 U.S.C. § 252(e)(5).

<sup>42</sup> See, e.g., 47 U.S.C. § 253(d); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986) (finding a basis for Commission preemption where compliance with both federal and state law is in effect physically impossible).

<sup>43</sup> See Petition at 1. We need not consider whether the Arizona Commission properly addressed Autotel's request for termination of Citizens' rural exemption under section 251(f) on the merits.

Commission.<sup>44</sup> We note that the instant Petition includes facts and arguments that closely parallel previous Autotel preemption petitions that have been denied by the Wireline Competition Bureau.<sup>45</sup> The Commission has previously concluded that pleadings may be deemed frivolous if they are “filed without any effort to ascertain or review the underlying facts” or are “based on arguments that have been specifically rejected by the Commission ... or [have] no plausible basis for relief.”<sup>46</sup> Thus, we urge all parties to consider fully the record of a proceeding and relevant Commission precedent when initiating or participating in proceedings before the Commission.

#### IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that, pursuant to sections 252 of the Communications Act of 1934, as amended, 47 U.S.C. § 252, and sections 0.91, 0.291, and 51.801(b) of the Commission’s rules, 47 C.F.R. §§ 0.91, 0.291, 51.801(b), the petition filed by Autotel on October 20, 2006 for the preemption of the jurisdiction of the Arizona Corporation Commission IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Navin  
Chief, Wireline Competition Bureau

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<sup>44</sup> See 47 C.F.R. § 1.52; *Commission Taking Tough Measures Against Frivolous Pleadings*, Public Notice, 11 FCC Rcd 303 (1996).

<sup>45</sup> We recognize that Autotel has filed an Application for Review of the *Five State Autotel Order*. The Application for Review is currently pending before the Commission. See *Five State Autotel Order Application for Review*.

<sup>46</sup> *Implementation of Cable Television Consumer Protection Act*, MM Docket No. 92-265, Public Notice, 9 FCC Rcd 2642, 2657 (1993). Cf. *Arizona Opinion and Order* at 5; *Arizona Procedural Order* at 3.